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UNIQUE CREATIONS SDN BHD

v.

TRIBUNAL TUNTUTAN PEMBELI RUMAH & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
AZIAH ALI J

[JUDICIAL REVIEW NOS: R1-25-209-2007,
25-266-2007, 25-299-2007, 25-310-2007,
25-328-2007, 25-377-2007, 25-341-2007,
25-346-2007, 25-347-2007, 25-431-2007
& 25-30-2008]

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30 SEPTEMBER 2010

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ADMINISTRATIVE LAW: *Judicial review - Certiorari - Housing tribunal, award of - Tribunal awarding house buyers damages for late delivery of vacant possession - Whether Tribunal had misconstrued law - Whether claim for damages time-barred - Rules of the High Court 1980, O. 53 - Housing Developers (Control And Licensing) Act 1966, s. 16N - Limitation Act 1953, s. 6*

E

CIVIL PROCEDURE: *Action - Limitation - Issue of - Claim for damages - Applicant's failure to deliver vacant possession within prescribed period - Section 16N(2)(b) Housing Developers (Control And Licensing) Act 1966 - Interpretation and import - Whether could override time-barred limitation on s. 6(1) Limitation Act 1953 - Whether action time-barred*

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LIMITATION: *Contract - Breach - Accrual of cause of action - Action against housing developer for delay in completion of house - Claim for damages - Whether claim time-barred - Whether Housing Tribunal erred in allowing claim - Limitation Act 1953, s. 6(1) - Housing Developers (Control And Licensing) Act 1966, s. 16N(2)(b)*

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STATUTORY INTERPRETATION: *Duty of court - Court to give effect to statute regardless of consequences - Whether court has power to fill gaps - Tribunal's jurisdiction pursuant to s. 16N Housing Developers (Control And Licensing) Act 1966*

I

The 1st respondent Housing Tribunal ('tribunal') allowed the claim of the 2nd to 13th respondents house buyers ('respondents') for liquidated damages for late delivery of vacant possession under a Sale and Purchase Agreement ('SPA'). The SPA was entered on 21 October 1997 between the applicant as developer/vendor and

the respondents with an undertaking by the applicant to deliver vacant possession within 36 months from the date of the SPA *ie*, on or before 20 October 2000. The applicant failed to deliver vacant possession within the stipulated period and under cl. 22(2) of the SPA, the applicant should pay the respondents liquidated damages calculated on daily basis at a rate of 10% per annum of the purchase price. On 19 June 2007, the respondents filed a claim with the tribunal against the applicant for late delivery of vacant possession amounting to RM74,169.86 each. The respondents reduced the said sum to RM50,000 for the sole purpose of bringing the claim within the jurisdiction of the tribunal. The applicant contended that the claim was time-barred pursuant to s. 6(1) of the Limitation Act 1953 ('the 1953 Act') which provided a limitation period of six years. The tribunal however rejected the applicant's defence of limitation and found the claim filed within the period provided by s. 16N(2)(b) of the Housing Developers (Control And Licensing) Act 1966 ('the 1966 Act') and was not statute barred on the ground that there was a specific Act or provision in the 1966 Act. The applicant contended that the tribunal had erred in law and filed for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the award of the tribunal.

Held (allowing the application):

- (1) The tribunal misconstrued s. 16N of the 1966 Act as conferring it with jurisdiction to hear claims despite the provisions of s. 6 of the 1953 Act. The court had no jurisdiction to extend the period of limitation under the 1953 Act or to override it on equitable grounds and, thus, in the absence of an express provision to the contrary in the 1966 Act, the tribunal had erred by construing s. 16N as conferring jurisdiction to hear the 2nd respondent's claim despite clear evidence that the claim had been time-barred by virtue of the 1953 Act. (paras 18 & 23)
- (2) The parties were bound by the SPA and, therefore, there was no merit in the respondents' submissions that the court could exercise its inherent jurisdiction to supplement the SPA which was statutorily prescribed. (para 22)

- A (3) The tribunal's decision would result in absurdity as it would allow time-barred claims to evade the 1953 Act by limiting the claim to RM50,000 and filing it with the tribunal. (para 23)

Case(s) referred to:

- B *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197 CA (**refd**)
Che Mas Che Mamat v. Kamariah Che Senik & Ors [1974] 1 LNS 20 FC (**refd**)
Chinaya Ganggaya v. Sentul Raya Sdn Bhd [2008] 3 CLJ 23 HC (**refd**)
Credit Corp (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 SC (**refd**)
- C *Insun Development Sdn Bhd v. Azali Bakar* [1996] 2 CLJ 753 SC (**fol**)
Loh Wai Lian v. SEA Housing Corporation Sdn Bhd [1987] 1 LNS 37 PC (**refd**)
Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed [1997] 3 CLJ 332 SC (**refd**)
- D *Nasri v. Mesah* [1970] 1 LNS 85 FC (**refd**)
Nathan Arumugam v. Chin Jin Tse [1982] CLJ 555; [1982] CLJ (Rep) 602 HC (**refd**)
Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals [2008] 4 CLJ 618 CA (**fol**)
Sime Hok Sdn Bhd v. Soh Poh Sheng [2009] 9 CLJ 848 HC (**refd**)
- E *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717 FC (**refd**)
Tribunal Tuntutan Pembeli Rumah v. Westcourt Corp Sdn Bhd [2004] 2 CLJ 617 CA (**refd**)
Westcourt Corporation Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah [2004] 4 CLJ 203 FC (**refd**)
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Legislation referred to:

Housing Developers (Control And Licensing) Act 1966, s. 16N(2)(b)
Limitation Act 1953, s. 6(1)
Rules of the High Court 1980, O. 53

- G *For the applicant - Desmond Choi; M/s SR Yap Desmond & Rizal*
For the respondent - Govin T Durai; M/s Govin T Durai & Co

Reported by Melanie Murthy

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JUDGMENT

Aziah Ali J:

- I [1] By way of Permohonan Untuk Semakan Kehakiman No. R1-25-209-07; R1-25-227-07; R1-25-266-07; R1-25-299-07; R1-25-310-07; R1-25-328-07; R1-25-341-07; R1-25-346-07; R1-25-347-

07; R1-25-348-07; R1-25-374-07; R1-25-376-07; 25-431-07; R1-25-377-07 and R1-25-30-08, the applicant applied for judicial review under O. 53 of the Rules of the High Court 1980 for an order of *certiorari* to quash the award made by the 1st respondent which ordered the applicant to pay damages for late delivery of vacant possession to the 2nd respondents, and for a declaration that the claims by the 2nd respondents are time-barred pursuant to the Limitation Act 1953 (“the 1953 Act”).

[2] All the 2nd respondents in the suits were represented by the same firm of solicitors. The material facts in all the suits relevant to the issues for determination are similar. Hence it was agreed that the decision in suit No.R1-25-227-2007 would bind all the other cases. The decision would be based on the written submissions.

[3] Having perused the submissions of both counsels, I allowed the application and quashed the award made by the 1st respondent. This is an appeal by the 2nd respondents in suit No. R1-25-209-2007; R1-25-266-2007; R1-25-299-2007; R1-25-310-2007; R1-25-328-2007; R1-25-377-2007; R1-25-341-2007; R1-25-346-2007; R1-25-347-2007; R1-25-431-2007 and R1-25-30-2008.

Background Facts (R1-25-227-2007)

[4] The applicant as vendor and the 2nd respondent as purchaser entered into a sale and purchase agreement dated 21 October 1997 (“the SPA”) for the sale and purchase of a unit of apartment in a housing development known as Section 2 Bandar Pinggiran Subang, Mukim Sungai Buloh, District of Petaling, Selangor (“the Property”).

[5] The SPA entered into is as provided for in Schedule H of Housing Developers (Control And Licensing) Regulations 1989. The relevant clauses of the SPA relating to the application are as follows:

7. Time Essence of Contract

Time shall be the essence of the contract in relation to all provisions of this Agreement.

22. Time For Handing Over of Vacant Possession

(1) Vacant possession of the said Parcel to which water and electricity supply are ready for connection shall be handed over to the Purchaser within thirty-six (36) calendar months from the date of this Agreement.

- A (2) If the Vendor fails to hand over vacant possession of the said Parcel, to which water and electricity supply are ready for connection to the said Parcel, in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price.
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23. Manner of Delivery of Vacant Possession

- C (1) Upon the issuance of a Certificate by the Vendor's Architect certifying that the construction of the said Parcel has been duly completed and water and electricity supply are ready for connection to the said Parcel and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation from the Appropriate Authority and the Purchaser having paid all monies payable under Clause 4(1) in accordance with the Third Schedule and all other monies due under this Agreement and the Purchaser
- D having performed and observed all the terms and covenants on his part under this Agreement the Vendor shall let the Purchaser into possession of the said Parcel:

- E PROVIDED THAT SUCH POSSESSION SHALL NOT GIVE THE Purchaser the right to occupy and the Purchaser shall not occupy the said Parcel until such time as the Certificate of Fitness for Occupation for the said Building is issued.

- F (2) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Parcel, whether or not the Purchaser has actually entered into possession or occupation of the said Parcel, the Purchaser shall be deemed to have taken delivery of vacant possession.

- G [6] Pursuant to cl. 22(1) vacant possession ought to have been delivered on or before 20 October 2000. However the applicant failed to deliver vacant possession within the stipulated period. The applicant did not dispute that there was late delivery of vacant possession.

- H [7] On 19 June 2007 the 2nd respondent filed a claim with the 1st respondent against the applicant for damages for late delivery of vacant possession ("LAD") amounting to a total of RM74,169.86. In order to bring his claim within the jurisdiction of the 1st respondent, the 2nd respondent limited his claim to RM50,000. All the 2nd respondents in the other suits whose claim
- I exceeded RM50,000 did the same.

[8] Before the 1st respondent, the applicant put up a defence amongst others that the 2nd respondent's cause of action which was based on a contract was time-barred by virtue of s. 6(1) of the Limitation Act 1953 ("the 1953 Act") which provides that in the case of actions founded on a contract the period of limitation shall be six years. It is the applicant's contention that the time prescribed under the 1953 Act expired on 21 October 2006. The applicant submits that limitation is a full defence. "Strictly speaking a defence of limitation is usually raised against a claim founded on a cause of action which however good it may be is barred by the statute of limitation because the claim is not made within the time prescribed by the Statute." (per Ali FJ in *Che Mas binti Che Mamat v. Kamariah binte Che Senik & Ors* [1974] 1 LNS 20).

[9] The 1st respondent rejected the defence of limitation. The 1st respondent found the claim was filed well within the period provided under s. 16N(2)(b) of the Housing Developers (Control And Licensing) Act 1966 ("the 1966 Act") and was not statute-barred on the ground that there is a specific Act or provision in the 1966 Act. The 1st respondent further said that "if the respondent's defence is accepted it would lead to an absurd situation as it means that a Developer has to pay compensation if vacant possession is delivered late by less than six years but a Developer need not pay compensation if vacant possession is delivered late by more than six years." The applicant contended that the 1st respondent had erred in law, hence this application for judicial review.

Accrual Of Cause Of Action

[10] Counsel for the applicant referred to the case of *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69 where Hashim Yeop A. Sani CJ (Malaya) said *inter alia* as follows:

From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.

In the case of *Sime Hok Sdn Bhd v. Soh Poh Sheng* [2009] 9 CLJ 848 the High Court referred to the Federal Court case of *Nasri v. Mesah* [1970] 1 LNS 85 in which Gill FJ said:

- A A “cause of action” is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* [1889] 22 QBD 128, 131). In *Reeves v. Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
- B This expression, ‘cause of action’, has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it
- C has always been held that the statute runs from the earliest time at which an action could be brought.

[11] Counsel for the applicant submits that in the present case the cause of action arose in year 2000 which was the earliest instance when the 2nd respondent has a complete cause of action where all the material facts to be proved has happened (*The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* [2005] 4 CLJ 717). The LAD could have been ascertained and accurately calculated based on cl. 22(2) of the SPA which is 10% per annum on the purchase price calculated on a daily basis. According to the applicant’s calculation the LAD amounted to RM24.11 per day. Thus it is submitted that a complete cause of action due to the failure to deliver vacant possession arose in year 2000 and not on the date of actual delivery of vacant possession in 2007.

- F [12] With regard to the SPA, counsel submits that the SPA in the present case is similar to the SPA considered in the Federal Court case of *Insun Development Sdn Bhd v. Azali bin Bakar* [1996] 2 CLJ 753. In that case cl. 18 of the SPA stipulates that delivery of vacant possession shall be within 24 months from the date of the agreement. The vendor’s defence was that the purchaser’s claim was barred by s. 6(1) of the 1953 Act. It was contended that the purchaser’s cause of action accrued on the day following the time limited under the agreement for completion and delivery of vacant possession, and the purchaser having commenced proceedings more than seven months later was therefore out of time.

- I [13] The Federal Court distinguished *Insun Development* from the Privy Council decision in *Loh Wai Lian v. SEA Housing Corporation Sdn Bhd* [1987] 1 LNS 37. In *Loh Wai Lian* the Privy Council held that the existence of opening date (*terminus ad quo*) and

closing date (*terminus ad quem*) is the determining factor in deciding that the date of cause of action accrued on the date of actual delivery of vacant possession. In *Insun Development* the Federal Court held *inter alia* as follows:

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It is clear law, that in the absence of express contractual provision, the purchaser's right to sue for damages would accrue on the date of the breach of contract. But, the parties to a contract are free to regulate or modify their rights in the event of breach thereof in such manner as to postpone the date of accrual of their right to sue for damages.

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The obvious difference between the contract of sale in *Loh Wee Lian* and the agreement in this case was this: under the former, the statutory formula for the calculation of the indemnity was modified by expressly stating not only the *terminus a quo* (the opening date) but also the *terminus ad quem* (the closing date), which was the date of actual completion and delivery of possession, whereas under the latter, although there was, by clause 18(2), also a formula for the calculation of liquidated damages, it only specifies the *terminus a quo* but not the *terminus ad quem*.

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The purchaser's right of action for damages for breach of contract, following the general rule, accrued on the date of the breach, which in this case was the day after the time limited under clause 18(2) for the delivery of vacant possession, ...

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In the case of *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon* (*supra*) Siti Norma Yaakob CJ (Malaya) in her judgment referred to *Loh Wai Lian* as follows:

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That case dealt with a contract between a housing developer and a purchaser under the Housing Developer (Contract and Licensing) Rules 1970 where two of the terms specify the date of the completion of the house whilst the other the developer's obligation to indemnify the purchaser for any loss suffered in the event there has been a delay in the delivery of the house for occupation. In such an event, the loss suffered shall be calculated at a specified rate from the date when possession ought to have been given until the date when possession was in fact given. Although this court agreed with the High Court that the purchaser's claim was time barred, the Privy Council held that since the parties had agreed to a single aggregate sum which could not be calculated until the house was completed and handed over, time did not run until that date. By the agreement the breach had been shifted from the date the house was to be completed to a date when the house was actually handed to the purchaser.

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- A [14] It is submitted that similar to the SPA considered in *Insun Development*, the SPA in the present case only has an opening date but not a closing date. Therefore counsel submits that applying *Insun Development*, the 2nd respondent's cause of action accrued on the date following the date when vacant possession should have been delivered in year 2000 and not on the date of actual delivery of vacant possession in year 2007.

- C [15] On the issue of when a cause of action accrues, I agree with the applicant that based on the facts, the cases of *Loh Wai Lian* and *Insun Development* are distinguishable. For the purpose of the present case *Insun Development* ought to be followed. Therefore the 2nd respondent's cause of action accrued in year 2000.

D **Issue Of Limitation**

- [16] In *The Great Eastern Life Assurance Co Ltd v. Indra Janardhana Menon (supra)* the Federal Court said as follows:

- E Section 6(i)(a) of the Act provides that "actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued". The law on when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. **A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach.** See the case of *Nasri v. Mesah* [1970] 1 LNS 85; [1970] MLJ 32 which followed *Board of Trade v. Cayzer, Irvine & Co* [1972] AC 610. (emphasis added)

Siti Norma Yaakob CJ (Malaya) said:

- G ... the Act itself has already set down the time table as to when time begins to run for the purpose of computing limitation periods.

- H [17] Counsel for the 2nd respondent referred to the case of *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors And Other Appeals* [2008] 4 CLJ 618. However limitation was not an issue in *Sentul Raya*. In that case the Court of Appeal said that once the date of delivery of vacant possession passed, the appellant's liability to pay liquidated damages in accordance with the formula provided became immediate. Hence no notice to claim damages was

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required. The court further said that the respondents were entitled to continue to claim liquidated damages until they took possession of the keys to their respective apartments. Thus *Sentul Raya* affirms the position that a cause of action founded on contract accrues on the date of its breach and once the date for delivery of vacant possession has passed without delivery of vacant possession, the liability of the developer to pay LAD arises. Applying the abovementioned case authorities to the present case, I agree with counsel for the applicant that the 2nd respondent's cause of action accrued on 21 October 2000, the date following the occurrence of the breach. It is not disputed that the 2nd respondent did not file his claim within six years from the date of breach. Despite his claim being for more than RM50,000 the 2nd respondent chose to limit his claim to RM50,000 and filed his claim with the 1st respondent in year 2007.

[18] The 1st respondent had relied on s. 16N(2)(b) as conferring him with jurisdiction to hear the 2nd respondent's claim. From the award it is apparent that the 1st respondent was of the view that the said provision 'ousted' the 1953 Act. In *Credit Corp (M) Bhd v. Fong Tak Sin* [1991] 2 CLJ 871; [1991] 1 CLJ (Rep) 69, His Lordship Hashim Yeop Sani CJ said as follows:

The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is non-existent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. **The rationale of limitation law should be appreciated and enforced by the courts.** (emphasis added)

The court has no jurisdiction to extend the period of limitation under the 1953 Act or to override the 1953 Act on equitable grounds. In *Majlis Peguam & Anor v. Tan Sri Dato' Mohamed Yusoff Mohamed* [1997] 3 CLJ 332 His Lordship Edgar Joseph Jr said:

- A ... there is no general judicial discretion, outside the Limitation Act, enabling the Court to relieve a suitor from the provisions of the Limitation Act on the ground of hardship and the Court cannot override the provisions of the Limitation Act on equitable considerations. (See also, *Nathan s/o Arumugam v. Chin Jin Tse* [1982] CLJ 555; [1982] CLJ (Rep) 602).
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In *Nathan Arumugam v. Chin Jin Tse (supra)* Ajaib Singh J (as he then was) said:

- C The Court had no jurisdiction to extend the period of limitation under the Limitation Act 1953 ...

There is provision enabling the Courts in England to extend the period of limitation under the Limitation Act 1939 as amended and extended by the Limitation Act 1963. But there is no such provision in our law

- D Thus in the absence of any express provision to the contrary in the 1966 Act, I find that the 1st respondent had erred when he construed s. 16N of the said Act as conferring him with jurisdiction to hear the 2nd respondent's claim despite clear evidence that the claim had become time-barred by virtue of the 1953 Act.
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- [19] Counsel for the 2nd respondent cited the Court of Appeal case of *Tribunal Tuntutan Pembeli Rumah v. Westcourt Corp Sdn Bhd* [2004] 2 CLJ 617 in support of his submissions that the primary aim of Parliament is to protect the homebuyer irrespective of when the agreement was entered into. In that case the issue before the Court of Appeal was whether the Tribunal has jurisdiction to hear and determine claims lodged by the claimants/homebuyers notwithstanding that the sale and purchase agreements were entered into before 1 December 2002 ("the appointed date"). The Court of Appeal was of the view that s. 16N(2) of the 1966 Act provides the perimeter of the jurisdiction of the Tribunal and the Tribunal has the jurisdiction to entertain and to adjudicate claims lodged with it even though the SPA was entered into before the appointed date. Accordingly the issue of retrospectivity of s. 16AD *vis-à-vis* an award given by the Tribunal should not arise. On appeal the Federal Court agreed with the Court of Appeal and held that that following s. 16N(2) of the Amending Act, the Tribunal has the jurisdiction to hear the claims without considering the agreement date, so long as claims
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before the Tribunal involves sale and purchase agreements between housebuyers and licensed developers and the claim brought does not exceed 12 months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the SPA. The Federal Court further held that the agreement date is not material to enable the Tribunal to hear the said housebuyer's claim.

[20] Counsel for the 2nd respondent took the approach that the decision of the Court of Appeal is to be interpreted as the Tribunal having jurisdiction to hear claims including those barred by the 1953 Act. I am of the view that the issue before the court in *Westcourt* was restricted to the question of the Tribunal's jurisdiction to hear claims arising out of sale and purchase agreements entered into before the appointed date. There was no reference to the issue of limitation under s. 6(1) of the 1953 Act. The rationale for the decision can be found in the judgment of the Federal Court in *Westcourt Corp Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah* [2004] 4 CLJ 203) as follows:

wajar diingat bahawa Akta Pindaan memperuntukkan perubahan forum daripada mahkamah kepada Tribunal. Ketara ini adalah perkara berkaitan prosedur dan bukannya substantif. Oleh yang demikian ianya adalah berkuat kuasa kebelakangan. Prinsip ini telah ditegaskan di dalam kes-kes *Ramzan Darzi & Ors v. Mst Azizi & Ors* [1976] CLJ 897 dan *New India Insurance Co Ltd v. Shanti Misra* AIR [1976] SC 237. Di dalam kes *Ramzan Darzi*, Jaswant Singh CJ di dalam penghakiman majoriti berkata di ms 898 dan 899:

The point that therefore remains for consideration is whether the choice of forum relates to the realm of procedure or not. That the choice of forum is a matter of procedure and is not a matter of substantive right and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned appears to be well settled. Reference in this connection may be made to a decision of the Allahabad High Court in *Hazari Tewari v. Mt Maktula* AIR [1932] All 30, where Sulaiman Ag CJ while interpreting the new Tenancy Act which conferred jurisdiction on the revenue court and barred the jurisdiction of the civil court in the matter of a suit in respect of which adequate relief could be obtained by way of a revenue suit observed as follows:

A The choice of forum is a matter of procedure and not a substantive right, and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned.

B Hence it can be seen that the question before the Court of Appeal and the Federal Court pertains to ‘forum’ which “is a matter of procedure and is not a matter of substantive right”. In my opinion Westcourt is no authority for the contention that the 1953 Act does not apply to claims before the Tribunal.

C **Schedule H**

D [21] Counsel for the 2nd respondent further referred to Schedule H of the Housing Development (Control and Licensing) Regulations 1989 and in particular cls. 25 and 27. This Schedule H relied on by counsel for the 2nd respondent is the Schedule H as amended by P.U.(A) 395/2007. P.U.(A) 395/2007 came into force on 1 December 2007.

E [22] Counsel urged this court to use its inherent powers to import those provisions in cl. 25 and 27 of the amended Schedule H for the benefit of the 2nd respondent. Clause 25(3) of Schedule H as amended provides *inter alia* that “any cause of action to claim liquidated damages by the purchaser under this clause shall accrue on the date the purchaser takes vacant possession of the said Parcel.” With respect I am unable to agree with counsel’s submissions. I am of the view that the parties are bound by the SPA that they had entered into. The SPA in the present case which was entered into in 1997 is similar to the SPA considered in *Chinaya Ganggaya v. Sentul Raya Sdn Bhd* [2008] 3 CLJ 23 cited by counsel. In that case Mohd Hishamudin J (as His Lordship then was) said:

... the right of the plaintiffs to LAD is solely governed by cl. 22(2) and 24(2) of the sale and purchase agreement ...

H Therefore there is no merit in counsel’s submissions that the court can exercise its inherent jurisdiction to supplement the SPA which is statutorily prescribed.

Conclusion

I [23] I find that the 1st respondent had misconstrued s. 16N of the 1966 Act as conferring it with jurisdiction to hear claims despite the provisions of s. 6 of the 1953 Act. I am of the view

that the decision of the 1st respondent would result in absurdity. It would mean that house buyers who filed their claims in the civil courts because their claims for LAD exceed the Tribunal's jurisdiction and they are not willing to limit their claim to RM50,000 would be subjected to the 1953 Act, whilst those housebuyers whose claims do not exceed RM50,000 or those housebuyers, like the 2nd respondent in the present case, who chose to limit their claim to RM50,000 in order to come within the Tribunal's jurisdiction, would not be subjected to the 1953 Act. The decision of the 1st respondent would allow those whose claims are time-barred to circumvent the 1953 Act by limiting their claim to RM50,000 and filing their claims with the Tribunal. Such conduct would be prejudicial to the applicant who had acquired the benefit of the defence of limitation on the expiry of the limitation period.

[24] In *Anwar Abdul Rahim v. Bayer (M) Sdn Bhd* [1998] 2 CLJ 197 Mahadev Shanker JCA said:

But an error of law would be disclosed if the decision maker asks himself the wrong questions, or takes into account irrelevant considerations, or omits to take into account relevant consideration, or if he misconstrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law.

It is evident from the award of the 1st respondent that issues which are material considerations were not canvassed nor considered. The 1st respondent had failed to take into account relevant and material matters. The failure of the 1st respondent to consider relevant matters and issues in its decision making process amounted to errors of law which merits curial intervention. For the aforementioned reasons I allowed the application in terms of prayers (c), (d) and (e) of encl. 1 with costs of RM2,500 to be paid by the 2nd respondent to the applicant.

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